In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 630

IDAHO POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

* * * * *

OPINION BELOW

The opinion of the court of appeals (R. 113–117) is reported at 346 F. 2d 956.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1965 (R. 118). A timely petition for rehearing was denied on July 8, 1965 (R. 119), and the petition for a writ of certiorari was filed on September 29, 1965. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).[1]

[1] The petition (p. 2) also asserts jurisdiction under Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009. The courts have consistently held that this section does not enlarge Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), which duplicates Section 313(b) of the Power Act. *Federal*

QUESTION PRESENTED

Whether the Federal Power Commission, in authorizing enlargement of the transmission facilities of a licensed hydroelectric project by the addition of new lines, may impose a condition requiring the licensee to make surplus transmission capacity of the project's entire transmission system available for transmitting government power at government expense.

STATUTE INVOLVED

The pertinent sections of the Federal Power Act are Sections 4(e) and (g), 6 and 10(a), 16 U.S.C. 797(e) and (g), 799 and 803(a).

Sections 4(e) and (g) provide:

> SEC. 4. The Commission is hereby authorized and empowered—
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> * * * * *
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> (e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the

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Power Commission v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500; *Wisconsin* v. *Federal Power Commission*, 292 F. 2d 753 (C.A.D.C.); *Magnolia Petroleum Co.* v. *Federal Power Commission*, 236 F. 2d 785 798 (C.A. 5), certiorari denied, 352 U.S. 903; *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461, 465 (C.A. 10). The same rule has been applied under the Power Act. *Utah Power & Light Co.* v. *Federal Power Commission*, 339 F. 2d 436 (C.A. 10).

development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation * * *.

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, State, or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

Section 6 is set out at pp. 4–5 of the petition.

Section 10(a) provides:

> SEC. 10. All licenses issued under this Part shall be on the following conditions:
>
> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

STATEMENT

In 1955 petitioner was authorized, by a single Federal Power Commission license, to construct three power developments on the Snake River in Idaho and Oregon. *Idaho Power Company*, 14 F.P.C. 55 (R. 3–11), affirmed *sub nom. National Hells Canyon Association v. Federal Power Commission*, 237 F. 2d 777 (C.A.D.C.), certiorari denied, 353 U.S. 924. With respect to transmission facilities the license provided as follows (R. 10):

> Article 45. The Commission expressly reserves the right to determine at a later date the question of what transmission lines and appurtenant facilities, if any, shall be covered in this license and included as part of the project works.

Thereafter, on petitioner's applications, the Commission from time to time amended the license to include transmission lines,[3] each time increasing the annual payment required of petitioner because of the increased use of government land.[4]

In September 1963, petitioner applied for authorization to construct two additional transmission circuits 101.7 miles in length (R. 39–41).[5] They cross 27 miles of government land, including 1.75 miles of the Boise and Payette National Forests (R. 42, 53, 57). The Secretaries of Interior and Agriculture recommended the granting of the application but urged that it be made subject to a "wheeling" condition.[6] They stated that such a condition would enable the government to defer construction of a Bonneville Power Administration transmission line, for which an initial appropriation of $1,000,000 had been requested, and would additionally "minimize the use of public lands for

[3] See Amendments Nos. 1 (R. 13–18), 2 (R. 21–26), 4 (R. 28–33) and 6 (R. 35–38).

[4] By the amendment licensing the first transmission line, Article 45 was amended to read as follows [R. 18]: "The Commission expressly reserves the right to determine at a later date the question of what additional transmission lines and appurtenant facilities, if any, shall be covered in this license and included as part of the project works."

[5] The application itself did not expressly request "amendment of the license," but petitioner repeatedly referred to it as an "application for amendment of the license" (R. 46, 58), and the Commission treated it as such. The two transmission circuits covered by the application are referred to in the opinion below (R. 117) as "not * * * included within the license; they have been expressly withheld," obviously by reason of Article 45 and the prior amendments licensing other lines.

[6] "Wheeling" is the transmission over one company's system of another's electric power.

transmission line right-of-way" and thus enhance the Power Act's objective of "assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources" (R. 42–45, 53–58). Petitioner responded that it was then, and intended to continue, wheeling government power, but it objected to an express condition to that effect (R. 45–49, 57–58).

By order of July 24, 1964 (R. 61–68; 32 F.P.C. 343–344), the Commission granted the requested authority, subject to the wheeling condition, which the court below summarized as follows (Pet. 4a):

> * * * that petitioner make available to the Government on a reasonable cost basis, all surplus transmission capacity within the primary lines of the project, and, upon appropriate request and at least one year's notice, increase the transmission capacity of the project transmission lines at the Government's expense. Under the license conditions, the Government's wheeling is limited to "such amounts as will not unreasonably interfere with the Licensee's use of said lines," and to transmission "only to consuming facilities of the United States and to public bodies and co-operatives entitled to statutory preference in connection with the distribution and sale of electric energy by the United States."

The court of appeals affirmed the Commission's order on the ground that the condition was reasonably related to the subject of the amendment and that it was not rendered improper merely because the condition attached to project transmission lines already

licensed as well as to those that had not been previously authorized (Pet. 6a).

ARGUMENT

The decision of the court of appeals was correct and it does not conflict with any decision of this Court or of any other court of appeals. No important federal question unresolved by this Court has been presented. Consequently, there is no occasion for further review.

The validity of a wheeling condition such as that involved here was established by *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17. The fact that the condition here refers to surplus capacity of previously licensed transmission lines as well as of the lines for which authorization is being sought does not affect its validity. All that the Commission has done, in effect, is to authorize enlargement of project transmission facilities only if existing ones are fully utilized, and its condition therefore necessarily affects use of the previously licensed and constructed lines. There is no merit to petitioner's contentions that this makes the earlier licenses "open-ended" (Pet. 13–14) or that it alters them in violation of the prohibition upon unilateral changes included in Section 6 of the Power Act (Pet. 14–18). The wheeling requirement has not been imposed upon the earlier licenses; it has merely been prescribed as a reasonable condition upon the licensing of additional facilities. Cf. *Montana Power Co.* v. *Federal Power Commission*, 298 F. 2d 335, 340 (C.A.D.C.).

In here conditioning petitioner's right to enlarge the project transmission facilities upon petitioner's

making the surplus capacity of all project transmission facilities available to the government at government expense, the Commission was following the rationale of this Court in the *Idaho Power* case, *supra*.[4] As the court of appeals observed (R. 117):

> "* * * The Commission as 'guardian of the public domain' has simply and reasonably required 'that existing lines be fully utilized before additional lines are authorized.' *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 23 (1952)."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

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Solicitor, Federal Power Commission.

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[4] The condition that was upheld in *Idaho Power*, *supra*, first appeared in an order of October 13, 1949 (8 F.P.C. 1177–1183), superseding a licensing order previously issued March 2, 1948 (7 F.P.C. 435). The earlier order, like the original licensing order here (*supra*, p. 4), had issued a license for all of the project except transmission lines, which it left for later determination, and the project works thereby licensed had been practically completed when the superseding order added two 138 kv (single circuit) transmission lines, one 73 miles in length, the other 116 miles.